INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
The statutes and regulations	3
Statement	10
Specification of errors to be urged	12
Summary of argument	12
Argument:	
I. Preliminary statement of the questions involved and their relation to each other	17
II. Article III of the Jay treaty was abrogated by the War of 1812. If treated as still effective, it grants only the privilege of travel, navigation, trade, and commerce, and it was never intended to do more	21
III. An alien who visits the United States to labor for hire is not a visitor for business	48
Appendix A. General Order No. 86, Bureau of Immigration, April 1, 1927	59–62
B. Opinion of Circuit Court of Appeals for Second Circuit in *U. S. ex rel Graber* v. *Karnuth*	63–68
C. Letter of October 13, 1924, to the Secretary of State from Assistant Secretary, Department of Labor	69–71

CITATIONS

Cases:	
Brandi v. *Nagle*, 17 F. (2d) 719	20
Diabo, U. S. ex rel v. *McCandless*, 18 F.(2d) 282	26
Graber, U. S. ex rel v. *Karnuth* (not yet reported; C. C. A. 2d)	55
Hijo v. *United States*, 194 U. S. 315	21
Hughes v. *Edwards*, 9 Wheat 489	25
Jackson v. *Clarke*, 3 Wheat 1	25
Lapina v. *Williams*, 232 U. S. 78	20
Lewis v. *Frick*, 233 U. S. 291	20
Morini v. *United States*, 21 F.(2d) 1004	20
McCandless v. *Diabo*, 25 F.(2d) 71	26
Shanks v. *Dupont*, 3 Pet. 241	25
Society for the Propagation of the Gospel in Foreign Parts v. *Town of New Haven*, 8 Wheat. 464	22, 23–25
Sutton v. *Sutton*, 1 Russell & Mylne's Reports, p. 663	25, 43–44

Cases—Continued.	Page
Techt v. *Hughes*, 229 N. Y. 222	20
United States v. *Lee Yen Tai*, 185 U. S. 213	21
Statutes:	
Immigration act of February 5, 1917, c. 29, sec. 3, 39 Stat. 874, 875	50
Act of May 19, 1924, c. 8, sec. 2(a), 42 Stat. 5	51
Immigration act of 1924, c. 190, 43 Stat. 153—	
Sec. 3; U. S. C., title 8, sec. 203	3-4
Sec. 4; U. S. C., title 8, sec. 204	4
Sec. 5; U. S. C., title 8, sec. 205	4-5
Sec. 7; U. S. C., title 8, sec. 207	5
Sec. 13; U. S. C., title 8, sec. 213	5
Sec. 24; U. S. C., title 8, sec. 222	5
Act of April 2, 1928, c. 308, 45 Stat. 401	27-28
Treaties:	
United States and Great Britain, September 3, 1783 (8 Stat. 80, 82, 83)—	
Art. III	38-39
Art. VI	22-23
Jay Treaty of 1794 (8 Stat. 116, 117, 122, 129)—	
Art. III	6-9
Art. IX	23
Art. XXVIII	43
Explanatory Article	45
Treaty of Ghent, December 24, 1814, art. 9 (8 Stat. 218, 222)	27
United States and Great Britain, October 20, 1818 (8 Stat. 248)	41
Versailles, June 29, 1919, art. 289	42
St. Germain, September 10, 1919, art. 241	42
Neuilly, November 27, 1919, art. 168	43
Congressional reports:	
Senate Rept. No. 17, pp. 4, 5; 67th Cong. 1st sess.	53-54
House Rept. No. 4, pp. 2, 3, 6; 67th Cong., 1st sess.	52, 53
House Rept. No. 350, 68th Cong., 1st sess.	54
Textbooks:	
American State Papers, Foreign Relations, Vol. I, p. 503; Vol. IV, pp. 355, 357	39-40
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Westlake, International Law, Part II, pp. 32–35 36
Wheaton, Elements of International Law (Lawrence's 6th ed.), p. 343 29
Woolsey's International Law (6th ed.), pp. 263–264 32–34
Immigration rules, etc.:
Rule 9, Par. 1, sub. E, February 1, 1924 18
Rule 3, Par. 1, sub. H, July 1, 1925 18
Rule 3, Par. 1, sub H, March 1, 1927 18
Rule 3, Par. 1, sub. Q, March 1, 1927 19
Rule 24, Par. 2, sub. E, March 1, 1927 19
General Order No. 86, prescribed by Commissioner General of Immigration, April 1, 1927 6
General Instruction Consular No. 926, issued by Department of State September 30, 1925, pars. 35, 37, 48, pp. 11, 14 6
Executive Order No. 4476, July 12, 1926 (Par. I, subdiv. (2), p. 88, Immigration Rules of March 1, 1927) 20

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge United State Immigration Service, petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIGN BELOW

The opinion of the District Court (R. 15) is not reported. The opinion of the Circuit Court of Appeals (R. 23) is reported in 24 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1928. (R. 28.) The petition

for certiorari was filed June 12, 1928, and granted November 19, 1928. (R. 29.)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

Section 3 of the Immigration Act of 1924 defines an immigrant as—

> any alien departing from any place outside the United States destined for the United States, except * * * an alien visiting the United States * * * temporarily for business or pleasure.

The main question in this case is whether an alien who comes to the United States to perform labor for hire, or to seek such employment, is here for business within the meaning of the statute.

This case relates to aliens living in Canada and crossing the border daily to work, but the question is broader than that, and as a visit is considered temporary, although lasting for months, the decision will determine whether aliens coming here from contiguous or other foreign countries to work for periods of several months are here for business. The practical effect of holding that labor is business will be to allow aliens to enter and reenter temporarily to labor for hire as nonimmigrants and without regard to the quota limits established to protect American labor.

As bearing on the proper construction of the statute, questions arise whether Article III of the Jay Treaty of 1794, giving—

> to his Majesty's subjects, and to the citizens of the United States,

the privilege—

> freely to pass and repass by land or inland navigation, into the respective territories * * * and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other

is still in effect or was abrogated by the War of 1812, and whether, in any event, it was intended to do more than permit travel, trade, and commerce.

THE STATUTES AND REGULATIONS

The following are pertinent provisions of the Immigration Act of 1924 (c. 190, 43 Stat. 153; U. S. C. Title 8, Secs. 203–205, 207, 213, 222):

DEFINITION OF "IMMIGRANT"

> Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes

in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NONQUOTA IMMIGRANTS

Sec. 4. When used in this Act the term "nonquota immigrant" means—

* * * * *

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him.

QUOTA IMMIGRANTS

Sec. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a nonquota immigrant. An alien who is not particularly specified in this Act as a nonquota immigrant or a nonimmigrant shall not be admitted as a nonquota immigrant or a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from

the operation of any other law regulating or forbidding immigration.

APPLICATION FOR IMMIGRATION VISA

Sec. 7. (a) Every immigrant applying for an immigration visa shall make application therefor in duplicate in such form as shall be by regulations prescribed.

(b) In the application the immigrant shall state * * * the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; * * *.

Sec. 13. * * *.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

SEC. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

The following regulation, adopted pursuant to Section 24, by the joint action of the Secretary of

State and the Secretary of Labor, issued by the Department of State September 30, 1925, was part of "General Instruction Consular No. 926" (pp. 11, 14):

> *c. Determination of nonimmigrant status.*
>
> 35. Consuls are responsible in the first instance for determining whether or not an applicant is entitled to enter the United States as a nonimmigrant alien under section 3 of the act.
>
> * * * * *
>
> 37. * * *
>
> In passing on an application for passport visa and the evidence of status to be required, the following points should be carefully noted:
>
> * * * * *
>
> 48. Temporary visits, except under rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of section 3(2) of the act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under this section.

(Rule 8 is not material here.)

General Order No. 86, dated April 1, 1927, prescribed by the Commissioner General of Immigration, with the approval of the Secretary of Labor, is in Appendix A, at page 58.

Article III of the Jay Treaty of 1794 (8 Stat. 116, 117) is as follows:

It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood, that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner

as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great Britain.

All goods and merchandize whose importation into his Majesty's said territories in America, shall not be entirely prohibited, may freely, for the purposes of commerce, be carried into the same in the manner aforesaid, by the citizens of the United States, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by his Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner, all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by his Majesty's subjects, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said states. And all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively, paying duty as aforesaid.

No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods

and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

No higher or other tolls or rates of ferriage than what are or shall be payable by natives, shall be demanded on either side; and no duties shall be payable on any goods which shall merely be carried over any of the portages or carrying-places on either side, for the purpose of being immediately reembarked and carried to some other place or places. But as by this stipulation it is only meant to secure to each party a free passage across the portages on both sides; it is agreed, that this exemption from duty shall extend only to such goods as are carried in the usual and direct road across the portage, and are not attempted to be in any manner sold or exchanged during their passage across the same, and proper regulations may be established to prevent the possibility of any frauds in this respect.

As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favorable to friendship and good neighbourhood, it is agreed, that the respective governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all who may be concerned therein.

STATEMENT

The respondents, Mary Cook and Antonio Danelon, sought admission to the United States from Canada on December 1, 1927. Neither was born in Canada. Mary Cook is a British subject, born in Scotland, and came to Canada in May, 1924. She resides at Niagara Falls, Ontario, and is a spinner by occupation. (R. 10.) She had been employed for three weeks in the United States, crossing daily to her work. (R. 11.) At the time in question she was out of employment and sought admission to look for work (R. 11), hoping to find employment in a silk mill in Buffalo (R. 12).

Antonio Danelon was born in Italy. (R. 4.) He went to Canada, through the United States, in 1923 (R. 4), and lived with his father, Pietro Danelon, in Niagara Falls, Ontario. His petition for habeas corpus alleged that he became a Canadian citizen in 1924 by his father's naturalization (R. 2), but the record does not contain any proof of that fact (R. 7). It is not important whether he was or was not naturalized, as only native-born, and not naturalized, Canadians are exempt from the quota. He had been working at Niagara Falls, N. Y., since November, 1926 (R. 5), for the United States Light and Heat Company and for the Aluminum Company, crossing the border daily to work through the use of an identification card. His father had made application to the United States Consul in Canada in 1925 for quota visas for himself and the whole

family, but had not obtained them. (R. 6.) When held for inquiry in December, 1927, he was seeking admission to work by the day.

Both aliens were refused admission because not in possession of an unexpired consular immigration visa, and on the ground that they were immigrants because not visiting the United States for business.

A writ of habeas corpus was sued out in behalf of the two aliens. The District Court held that, assuming Article III of the Jay Treaty to be still in force, it only permitted passing from one country to another to carry on trade or commerce, and that passing to labor for daily wage was not within the contemplation of the treaty. The District Court also held that a visit to labor for hire was not a visit for business within the meaning of the exception in Section 3 of the Immigration Act of 1924. Holding that the aliens were immigrants within the meaning of Section 3 and not covered by the exception, it dismissed the writ and remanded the aliens to the custody of the immigration officials for exclusion. (R. 15–20.)

On appeal, the Circuit Court of Appeals held that these aliens were not immigrants because they did not intend to remain here permanently and that the coming of an alien to the United States daily to labor for hire was a visit for business within the meaning of Section 3 (2) of the Immigration Act. It also held that Article III of the Jay Treaty was still in effect and that its provision allowing British subjects to pass our boundaries by land or inland

navigation and to navigate our waters and to carry on trade and commerce allowed British subjects to come into the United States and labor for hire, and it reversed the order of the District Court. (R. 23–28.)

SPECIFICATION OF ERRORS TO BE URGED

I. The Circuit Court of Appeals erred in reversing the order of the District Court.

II. The court erred in holding that the respondents were nonimmigrants under Section 3 of the Immigration Act of 1924 and that in visiting the United States to labor for hire they were visiting the United States for business.

III. The court erred in holding that Article III of the Jay Treaty was still in effect and in holding that it allows British subjects freely to cross the border to labor for hire, or that it ever did more than permit free travel and trade and commerce.

SUMMARY OF ARGUMENT

I. On the answer to the question whether aliens coming here temporarily to labor for hire are here for business depends the decision as to whether such aliens are subject to the quota restrictions, and in that is found the practical importance of this case. The effect of the ruling below is not limited to those crossing the border daily for labor. Visits for business are considered temporary if as long as six months or a year. If coming for labor

is coming for business, a temporary stay of months to labor for hire is allowed regardless of the quota.

Natives of Canada and natives of Mexico are not subject to the quota, and are not seriously affected by this case, if physically, mentally, and morally qualified for admission. If the ruling below is right, aliens residing across our borders, not native-born Canadians or Mexicans, and aliens coming from abroad, are admissible regardless of the quota restrictions to engage in labor for hire for periods of months. The petitioners contend that the respondents were immigrants under Section 3 of the Immigration Act, because they were aliens departing from places "outside of the United States destined for the United States," and that they were not within the exception of aliens visiting the United States temporarily for business, because labor for hire is not business within the meaning of the statute and that to otherwise construe the Act would break down the protection for American labor intended by the quota restrictions.

The Jay Treaty enters into the case only to influence the construction of the statute. We contend that Article III of the Treaty was abrogated by the War of 1812, and in any event only permitted travel, trade, and commerce.

The construction of the treaty is first in order.

II. Article III of the Jay Treaty was abrogated by the War of 1812.

32942—29——2

Whether treaty stipulations are abrogated by subsequent war depends on their nature. It is settled by judicial decisions in the United States and by the dominant opinion of writers on international law and by prevailing international practice that treaty stipulations which fix boundaries and permanent territorial arrangements and settle property rights and other national rights, or which by their terms provide for the event of intervening war, are not extinguished by war; but stipulations not of that character are abrogated by war. Treaty stipulations dealing with commerce and navigation, granting privileges of that character, are recognized to be of the type abrogated by war. The stipulations in Article III of the Jay Treaty for free passage for travel, navigation, trade, and commerce are of the type abrogated by war. Great Britain has consistently maintained that such stipulations relating to commerce and navigation are abrogated, not merely suspended, by hostilities. Nothing in the diplomatic dealings between the United States and Great Britain justifies the contention that Article III has been recognized as subsisting since the War of 1812. Such free passage over our Canadian boundary as has been permitted since 1812 has not been because of the treaty, or of any recognition of it, but because our statutes and regulations on immigration and passports have permitted it.

In any event, Article III, construed in the light of the conditions on the border in 1794, was in-

tended to permit travel, navigation, trade, and commerce, and was not intended to guarantee the privilege of locating in either country to labor for hire unconnected with commerce. Article III of the treaty, as we construe it, is consistent with the exception in Section 3 of the Immigration Act as we construe it, as the latter, allowing temporary visits for business, refers to business in the narrower sense and not labor for hire. Whether treated as not in effect or still operative, Article III of the treaty forms no obstacle to the petitioners' construction of the Immigration Act.

III. Section 3 of the Immigration Act of 1924 includes, under the term "immigrant," any alien departing from any place outside of the United States destined for the United States, with only the exceptions stated. Petitioners are squarely within the general definition. Decisions under former statutes holding "immigrants" to be only those coming here for permanent residence are not in point. If by the term "immigrant" Congress intended to designate only aliens arriving for permanent residence, why did it except aliens in continuous transit through the United States, or seamen entering temporarily between voyages, or tourists temporarily here for pleasure? The exceptions prove the rule.

In the exception of those visiting temporarily for business, Congress did not use the word "business" as including labor for hire. Labor for hire

is not within the fair intendment of the word "business" as used in this statute, and persons coming to labor are not business men.

One of the principal objects of the quota Acts is to protect American labor against an influx of cheap foreign labor. That purpose would, to a considerable extent, be defeated if aliens in contiguous countries, or coming from abroad, are admissible temporarily to labor for hire, regardless of quota restrictions, and may reenter as often as they please.

The construction we contend for does not injure native-born Canadians or Mexicans, who are not subject to quota restrictions and who are allowed free passage if morally, mentally, and physically eligible. As early as October, 1924, the State and Labor Departments ruled that temporary visits to perform labor for hire are not visits for business. That the Canadian boundary crossing problem was not promptly dealt with on that basis was owing to efforts to work out a proper method and because no serious influx of labor was threatened for some time.

General Order No. 86 was promulgated because aliens began in large numbers to seek this method of penetrating the quota restrictions. The decision below holding that labor is business opens the door to an influx, both from the borders and from abroad, of foreign labor coming for temporary sojourn of a few months for "business," and which,

through quick methods of transportation, penetrate not merely the border zone, but throughout the United States. Petitioners are immigrants within the definition of the statute, and they are not here for "business" within the exception.

ARGUMENT

I

PRELIMINARY STATEMENT OF THE QUESTIONS INVOLVED AND THEIR RELATION TO EACH OTHER

The ultimate question is whether aliens visiting the United States to labor for hire are visitors for business, but a general survey of the problem arising under the immigration laws is necessary to a proper understanding of the case. Prior to the Immigration Act of 1924 the law treated as immigrants those arriving for indefinite or permanent stay and not those visiting the United States for temporary purposes. Some restrictions as to mental, physical, and other qualifications are applicable to both classes. Other restrictions, which apply to those coming for permanent stay, were not applied to temporary sojourners. The first quota Act of 1921 and the Immigration Act of 1924, with new quota provisions, increased the restrictions. The two aliens involved in this case live just across our northern boundary and visited the United States to labor for hire, crossing daily and returning each night to Canada. If they are not immigrants within the meaning of the 1924 Act, because visiting the United States temporarily for business, they

are not subject to the quota restrictions, but operation of the decision below is not limited to those crossing the boundary daily. A visit for business under the immigration laws and regulations may be temporary, although for more than one day.

Paragraph 1 of subdivision E, Rule 9, of Immigration Rules, promulgated February 1, 1924, reads as follows:

> Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of Section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said Act.

The rules promulgated July 1, 1925 (Paragraph 1, subdivision H, Rule 3) and those issued March 1, 1927, prescribe no fixed limit. The latter reads as follows:

> In cases where an alien claims to be visiting the United States temporarily as a tourist, or temporarily for business or pleasure, and the examining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period on condition that such alien shall maintain such status of a nonimmigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed.

The regulations dealing with extensions of time provide:

> In no instance, however, shall the stay of an alien, admitted for a temporary visit, be extended for a period in excess of one year from the date of original entry. (Paragraph 2, Subdivision E, Rule 24, Immigration Rules of March 1, 1927.)

If aliens maintaining a domicile abroad may come here to labor as temporary visitors for business, they may stay here for months. Native-born Mexicans and native-born Canadians are exempted from the quota restrictions. (Sec. 4 (c), Immigration Act of 1924.) They may enter freely provided they are mentally, morally, and physically qualified. Once inspected they receive identification cards. The quota restrictions apply to naturalized Canadians and naturalized Mexicans, to aliens from other countries residing in Canada and Mexico, and to aliens coming from abroad (except natives of Cuba, Haiti, etc.). The position of the petitioners, if sustained, results in all aliens except native-born Canadians and native-born Mexicans, and natives of a few other places designated in Section 4 (c), being required to come within the quotas before admission to this country to labor for hire. Once admitted under the quota for that or any purpose, they may pass or repass the northern and southern boundary lines at will with identification cards prescribed by regulation. (Par. 1, sub. Q, Rule 3, Rules of March 1, 1927.)

These regulations are authorized by Sec. 13 (b), Immigration Act of 1924. (See also Executive Order No. 4476, July 12, 1926, Par. I, sub. (2), page 88, Immigration Rules of March 1, 1927.) If the respondents' contention is sustained, any alien physically, mentally, and morally qualified for admission at all, may enter the United States to labor for hire so long as he maintains his domicile abroad with the intention of returning there and provided his sojourn here is within the limits of a few months or a year. Leaving the United States and reentering results in a new visit.

An alien who leaves the United States and then returns makes a new entry.

Lapina v. *Williams*, 232 U. S. 78.
Lewis v. *Frick*, 233 U. S. 291.
Bendel v. *Nagle*, 17 F. (2d) 719.
Morini v. *United States*, 21 F. (2d) 1004.

The Jay treaty is brought into the case to make it appear that the Immigration Act, construed as we ask, would violate the treaty and repeal it, and the treaty is thus used to influence the construction of the statute so as to prevent the alleged conflict. Any construction of the statute brought about as a result of the treaty provisions will settle the meaning of the statute not only as to British subjects but as to all aliens, because what is a temporary visit for business for one alien is the same for all.

Before dealing with the construction of the Immigration Act, it is appropriate first to consider the treaty to determine whether it is a potent factor

in the interpretation of the statute. A statute may repeal a treaty, but if Article III of the Jay treaty be in force, and the statute, as we construe it, is in conflict with the treaty, that presents a formidable obstacle to the adoption of our construction. (*United States* v. *Lee Yen Tai*, 185 U. S. 213, 220; *Hijo* v. *United States*, 194 U. S. 315.)

II

ARTICLE III OF THE JAY TREATY WAS ABROGATED BY THE WAR OF 1812. IF TREATED AS STILL EFFECTIVE, IT GRANTS ONLY THE PRIVILEGE OF TRAVEL, NAVIGATION, TRADE, AND COMMERCE, AND IT WAS NEVER INTENDED TO DO MORE

The rules which determine whether a treaty stipulation is abrogated by war between the signatory powers are reasonably well defined. The effect of war depends upon the nature of the treaty stipulations. Some stipulations are of such a nature as to their object and import that war will put an end to them. Others are not affected by subsequent hostilities. Where a treaty stipulation provides for a permanent arrangement of territorial and other like national rights, such as boundary lines, or settles existing land titles, thus creating vested property rights, war does not abrogate the stipulation so as to divest the property rights or unsettle the permanent arrangements thus made. Treaties which by their terms deal with the case of war as well as peace, such as a stipulation that private property of enemy na-

tionals shall not be sequestered in time of war, manifestly are not abrogated by hostilities.

Treaties which expressly deal with intervening war and provide by their terms for the revival of the obligations after hostilities may have ceased, are not *ipso facto* extinguished by war. On the other hand, stipulations not of the kind above defined, and which merely grant temporary privileges not in the nature of fixed and permanent rights and arrangements are abrogated, not merely suspended, by war. The question here is whether the stipulations in Article III of the Jay treaty are of one type or of the other. It is not necessary to ascertain all of the different kinds of stipulations which are abrogated by hostilities. It seems to be generally recognized by the authorities, that an ordinary treaty of commerce and navigation, dealing with commercial intercourse between the treaty powers, is of the type abrogated, not merely suspended, by war, and the stipulations in Article III of the Jay treaty clearly are of that nature. The adjudged cases in the United States and in England are in accord with these principles.

In *The Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven*, 8 Wheat. 464, this Court dealt with the 6th Article of the Treaty of 1783, and with the 9th Article of the Jay treaty of 1794. The Definitive Treaty of Peace between the United States and His Britannic Majesty of September 3, 1783 (8 Stat. 80, 83), in Article VI, provided:

> That there shall be no future confiscations made * * * against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, * * *.

The 9th Article of the Jay Treaty of 1794 (8 Stat. 116, 122) provided:

> It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.

The case of *The Society, etc.* v. *New Haven, supra*, dealt with these stipulations and was an action in ejectment involving the title to land which depended upon the operation of these two treaty stipulations. It was contended, on one side, that these treaty stipulations did not protect the title because the treaty had been abrogated by the War of 1812, the cause having arisen thereafter. The Court said (page 493):

> But there is a still more decisive answer to this objection, which is, that the termination of a treaty can not divest rights of prop-

> erty already vested under it. If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty, extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it.

The Court then went on to discuss generally the question of abrogation of treaty stipulations by war and said (pp. 494–495):

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it is fixed our limits, and acknowledged our independence, would

> be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

This case did not, as asserted by the respondents in their brief in opposition, hold that the Jay Treaty was unaffected by the War of 1812. It held only that Article IX of the treaty, which operated to vest property rights, was not extinguished by subsequent hostilities in the sense of destroying the rights vested under it.

Jackson v. *Clarke*, 3 Wheat. 1; *Hughes* v. *Edwards*, 9 Wheat. 489; and *Shanks* v. *Dupont*, 3 Pet. 241, also deal with titles vested under Article IX of the Jay Treaty. There is no decision of this Court dealing with Article III.

In *Sutton* v. *Sutton*, 1 Russell & Mylne's Reports, 663, decided in the High Court of Chancery in 1830, the court was considering a bill for specific performance of a contract for the sale of real estate, the title to which was affected by the operation of

Article IX of the treaty of 1794, and the court held that Article IX was permanent in its effect and not of the type abrogated by hostilities. It dealt with no other stipulation of the treaty.

In *United States ex rel. Diabo* v. *McCandless*, 18 F. (2d) 282, the District Court for the Eastern District of Pennsylvania considered, in the case of an Indian, whether the stipulation in Article III of the Jay treaty, giving to the Indians dwelling on either side of the boundary line the privilege to pass and repass, was abrogated by the War of 1812. It held that the right of the Indians to pass from one part of the Indian country to another was not created by the treaty, and the fixing of the boundary line did not affect the right, and that the right was wholly unaffected by the treaty, except that the contracting parties agreed with each other that each would recognize it, and it held that there was no reason why the War of 1812 between the United States and Great Britain should have permanently abrogated the Indian right of passage. The case went to the Circuit Court of Appeals for the Third Circuit. (*McCandless, Comm'r of Immigration*, v. *Diabo*, 25 F. (2d) 71.) That court held, first, that the Indian right was not created by the Jay treaty, but existed independently of it, since the Indian country extended on both sides of the line; second, that there was no occasion to consider the effect of the War of 1812 on the treaty, in so far as it affected the signatory parties who went to war. It also referred to Article IX of the

Treaty of Ghent, which provided (8 Stat. 218, 222):

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities.

His Britannic Majesty made the same undertaking with respect to restoration of the Indians' rights and privileges.

The Circuit Court of Appeals thereupon held that even if the stipulation in Article III of the Jay Treaty, relating to the Indians, was abrogated by the War of 1812, the privilege granted by the Jay Treaty was restored by the Treaty of Ghent. It held, in substance, that in so far as the Indians were affected there was no reason why the War of 1812 should be considered as having extinguished any right of passage belonging to Indian tribes along the border. That case was decided March 9, 1928. While the question of applying for certiorari was under consideration, there was approved April 2, 1928, the following statute (c. 308, 45 Stat. 401):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the

Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.

That put an end to the litigation, but in passing it may be noted that the necessary inference from the statute is that the right of passage is limited to the Indians and that a white Canadian who joins a tribe by adoption is not entitled to the right.

It is obvious that none of the decisions above cited and none cited by the court below or by the respondents in opposition hold that the stipulation in Article III of the Jay treaty, in so far as it affected the contracting powers, remained in force after the War of 1812.

Writers on international law support the view that treaties often contain various unrelated provisions and that one provision in a treaty may be terminated by war while other provisions in the same treaty remain intact, and that whether stipulations are annulled by war depends upon their intrinsic character.

John Bassett Moore, Columbia Law Review, Vol. 1 [1901], pp. 209, 217, affirms:

> the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.

Wheaton, Elements of International Law (Lawrence's 6th Ed., p. 343), says:

> Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the [well] being of either party, and thus render the compact inapplicable to the new condition of things.

See also Phillimore's International Law, Ed. 1885, Vol. III, DXXXIV and DXXXV, and Halleck's International Law, Chap. XXXVI, p. 898.

In *Techt* v. *Hughes*, 229 N. Y. 222, 243, Judge Cardozo said:

> The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

That case dealt with the question whether the stipulation in the Convention between the United States and Austria of May 8, 1848, concerning the right of citizens or subjects of either country to inherit real property was abrogated by the war between the United States and Austria-Hungary. The court said further (p. 245):

> Commerce is friendly i n t e r c o u r s e. Friendly intercourse between nations is im-

possible in war. Therefore, treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature and not the name of covenants determines whether they shall be disregarded or observed. There is a line of division, fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations.

Crandall, in his book on Treaties, Their Making and Enforcement (page 451), says:

Whether such treaties are merely suspended in their operation during the period of the war and revive on the restoration of peace, or are definitively terminated if not expressly renewed, is a question on which writers on international law are not agreed. The practice of nations may, by implication at least, be considered as in derogation of the doctrine of the revival of such treaties *proprio vigore*. Moreover, it is the undoubted right of a belligerent to make the renewal of former treaty relations a condition of peace—ultimately to be determined by the victor—and the failure to do so might, in view of the usual practice of making express provision as to renewal, be considered as a waiver or an abandonment of that right.

In Kent's Commentaries on International Law, Abdy's Ed., 1866, it is said (pp. 420–421):

> As a general rule, the obligations of treaties are dissipated by hostility. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it. What would become of prisoners of war, and the terms of capitulation of garrisons and towns, if the word of an enemy was not to be relied on? The faith of promises and treaties which have reference to a state of war, is to be held as sacred in war as in peace, and among enemies as among friends. All the writers on public law admit this position, and they have never failed to recommend the duty and the observance of good faith, by the most powerful motives, and the most pathetic and eloquent appeals which could be addressed to the reason and to the moral sense of nations. The tenth article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have

in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war, and continued binding upon the two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact can not be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it. In the case of *The Society for Propagating the Gospel* v. *New Haven*, the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace. Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or where, by their terms, they are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.

In Woolsey's International Law, 6th Ed., pp. 263–264, it is said:

War suspends all intercourse, political, social, commercial, except so far as intercourse is required by the purposes of war itself. But does it end all treaties? In

answer we say that certain stipulations are in their nature or terms lasting. Such are: (1) Those which contemplate a state of war, and therefore could have no effect if rendered null by war. (2) Those which are declared to be perpetual, like the liberty, under our treaty of 1818 with Great Britain, "forever to cure and dry fish" in certain places (§59). War can only suspend such a provision. (3) Those which imply some state or relation in itself permanent. Of this kind is a past recognition of a state within certain boundaries. For an organized community upon a specific territory is an admitted fact, to which only conquest, the destruction of a condition otherwise permanent, can put an end. (4) The same perpetual nature belongs to a compact to regard certain rules or interpretations as part of the law of nations, since the state of peace or war between two parties cannot affect general principles of justice.

It has been held by some, especially earlier, writers, in some diplomatic documents, and by at least one nation, that apart from cases like those above mentioned treaties do not survive a new war. Dr. Twiss says that, in practice, Great Britain admits of no exception to the rule that all treaties, as such, are put an end to by a subsequent war between the contracting parties. ("Law of Nations in Peace," §234.) That the treaties of Westphalia and Utrecht were often renewed in treaties, following wars be-

> tween the parties to them, indicates that at least their survival was not certain. And if a war were closed without an express treaty, the rule of *uti possidetis* would decide even territorial sovereignty. We come, then, to this conclusion: that the effect of war on those provisions of treaties, the breach of which did not provoke the war, is at least doubtful, and that new treaties after war ought to contain explicit renewal of such arrangements. This is to a great extent the practice.

See also Moore's International Digest, Vol. 5, pp. 373 and 397.

Halleck, in his International Law, 4th Ed., Vol. 1, p. 314, expresses the following view:

> Treaties of alliance, of succour and subsidy, of commerce and navigation—in fine, all stipulations having reference exclusively to pacific relations, cannot be construed to subsist after such relations have become hostile.

He then draws a distinction between treaty provisions concerning commerce and navigation and stipulations concerning the fixing of boundaries, tenure of property, public debts, etc., which being essentially permanent in character are not terminated by wars.

Hyde in his work entitled "International Law, chiefly as interpreted and applied by the United States," says:

> Stipulations pertaining to commerce and navigation are not of permanent character,

> and do not purport to manifest a design on the part of the contracting States to establish rights which should survive a war between them. Nor is it believed that provisions concerning social intercourse, or pertaining to the enjoyment of economic and political privileges, such as are embraced in naturalization conventions, stand on a better footing. (Vol. II, page 95.)

In a footnote on the same page Mr. Hyde cites a number of instances in which treaty provisions concerning commerce and navigation were treated by the parties after the termination of wars between them as having been abrogated by such wars.

Phillimore's Commentaries upon International Law, Ed. of 1885, Vol. III, pp. 800-801, approves the view that treaties of commerce and navigation are annulled by war.

Hall's Treatise on International Law, 5th Ed., 1904, pp. 389–390, speaking of commercial treaties, postal conventions, etc., says:

> Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be

> all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.

Westlake, International Law, Part II, pp. 32–35, mentions three classes of treaties which are not affected by war, namely, (1) those providing "what is to be done in a state of war," (2) "transitory or dispositive treaties, including all those which are intended to establish a permanent condition of things," such as "treaties of cession, boundary, recognition of independence or of a dynasty" and those "intended for use in daily life and having no conceivable connection with the causes of war or peace"; and (3) "treaties establishing arrangements to which third powers are parties, such as guarantees and postal and other unions." With regard to all other treaties, including commercial treaties, he says:

> Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law. (Pp. 34–35.)

It would be an arduous task and avail little to attempt to set forth the views of writers other than

American and British upon this subject. However, in view of the high standing of the author, we call attention to the opinion expressed by Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55. After mentioning various classes of treaties not affected by war, he says:

> On the contrary a state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory States. War, to them, is a cause of final extinction and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty.

The passage just quoted is followed by a statement concerning the actual practice of states with regard to treaties after the termination of war between the parties, and the usual practice seems to have been to regard commercial treaties as having been annulled by the war.

Some writers are inclined to take the contrary view. Taylor's Treatise on International Public Law, paragraph 462; Hershey's Essentials of In-

ternational Public Law and Organization, Revised Edition, 1927, page 564; Lawrence, The Principles of International Law, Ed. 1895, pp. 310–311; Oppenheim, International Law, Ed. 1906, Vol. II, pp. 107–108.

Whatever difference of opinion there may be between authors on this subject, international practice is to treat commercial treaties and stipulations such as those contained in Article III of the Jay Treaty as abrogated, not merely suspended, by war.

So far as we can find, the British Government has consistently adhered to that view. The treaty of peace of 1783 between the United States and Great Britain (8 Stat. 80, 82) stipulated in Article III:

> It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova

> Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

In 1815 the question arose whether this stipulation had been abrogated by the War of 1812. The British Government took the position that the stipulation had been terminated. Mr. Adams, the American Minister at London, took the position that the stipulation was of a type suspended but not abrogated by war. Lord Bathurst said (American State Papers, Foreign Relations, Vol. IV, p. 355):

> It is by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. If it be thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore, all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage

> recognized or conceded by treaty can have no connexion with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connexion between the advantages themselves. But what necessary connexion can there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits are as capable of being exercised by a dependent, as by an independent state, and can not, therefore, be the necessary consequence of independence.

In his reply of January 22, 1816, to Lord Bathurst, Mr. Adams said (p. 357):

> The undersigned believes that there are many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements which, according to the expressions of Lord Bathurst's note, are *in the nature of perpetual obligation*. To the first and second of these classes may be referred the tenth article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third.

The British Government never yielded, and in October, 1818, a new treaty was signed (8 Stat. 248) which yielded to the citizens of the United States fishing privileges along the southern coast of Newfoundland and the coast of Labrador less than those enjoyed under the treaty of 1783.

So far as we can find, the British Government has not since the War of 1812 ever asserted that Article III of the Jay Treaty was not abrogated. At this time the Canadian immigration officials will not permit American workmen to cross into Canada to labor or to seek employment.

Neither can we find any assertion by the United States that Article III has remained in effect. In 1885, Secretary Bayard declared that the Treaty of 1794 had been abrogated, except as to property vested under it. (Moore's Digest, Vol. 5, p. 374.) Appendix D to General Instruction Consular No. 926, issued by the State Department September 30, 1925, regarding the administration of the Immigration Act of 1924, purports to contain a list of all treaties relating to commerce and navigation, to which Section 3(6) of the Immigration Act of 1924 is applicable, but neither the Jay Treaty nor Article III thereof is mentioned in the list.

It appears that, in response to a Resolution of the Senate dated February 3, 1919, directing the Secretary of State to furnish the Senate with information regarding

> the countries with which the United States has treaties which prevent us from giving

> preference to Americans or American ships in the carrying of imports and exports, and what is necessary to be done to abrogate such treaties, and what, if any, steps our Government has taken to secure the abrogation of the same,

the Acting Secretary of State, on March 27, 1919, transmitted a memorandum to the Senate in which Article III of the Treaty of 1794 was quoted as one of the treaty provisions which might be affected by legislation giving preferential treatment to Americans or American ships, and the statement was made:

> The treaty from which the above-quoted Article is taken contains no provision for abrogation; hence agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement.
>
> No action has been taken by either government looking to abrogation.

The suggestion thus made seems to be contrary to the weight of opinion. Certainly, consistently with its practice, the British Government would be the last to assert that Article III remained in effect after the War of 1812.

As the last important indication of international practice and understanding, it may be observed that in the treaties of peace terminating the World War (Treaty of Versailles, June 29, 1919, Article 289; Treaty of St. Germain, September 10, 1919, Article 241; Treaty of Neuilly, November 27,

1919, Article 168) provisions were made in which bilateral treaties between the parties existing at the time of the outbreak of war might be "revived." It was added that all other treaties should "remain abrogated."

In support of the theory that Article III of the Jay Treaty was intended by the parties to survive subsequent hostilities, mention has been made of the provision in Article XVIII of the treaty that it was—

> agreed, that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years * * *.

To meet this it is sufficient to quote the argument of the learned counsel who long ago argued the case of *Sutton* v. *Sutton*, 1 Russell & Mylne's Reports, 663, and who said (pp. 670–671):

> It was said before the Master, that the first ten articles of the treaty were to be "permanent," which was construed as synonymous with "perpetual"; but that is a construction which the twenty-eighth article does not admit of. The very first article is, "that there should be a firm and universal peace between *Great Britain* and the United States"; that is the first of the articles supposed to be ever-enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word "per-

> manent" is used, not as synonymous with "perpetual or everlasting," but in opposition to a period of duration expressly limited. The greater number of the articles of the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force; but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation.

Such of the first ten articles as remained in effect after the War of 1812 survived not by reason of the stipulation for permanency, but because intrinsically they or the rights vested under them were not of the type abrogated by hostilities.

We find no support for the respondents' contention that the practice of allowing persons residing in Canada to cross and recross the boundary line freely has been because of the belief that Article III of the Jay Treaty required it. This privilege has been allowed because it was in accordance with our legislative policy, and because the statutes and regulations on the subject of immigration and passports have not prohibited it.

There are many respects in which the stipulations of Article III have admittedly been treated as abrogated. For a long time it has not been free to all British subjects to freely pass into all territories of the United States and to freely carry on trade and commerce. Some have been excluded

because of lack of personal qualifications. The stipulation that the

> river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties

could not now be claimed to be in operation. The provision that—

> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively

has long since been abrogated by statute. Tariff Acts have long contained varying provisions imposing duties on furs, dressed and undressed.

Nevertheless, if Article III of the Jay Treaty be still in effect, it places no obstacle in the way of interpreting the word "business" in Section 3 of the Immigration Act of 1924 to exclude labor for hire. The fair import of Article III of the Treaty was to grant the privilege of traveling through the respective territories, navigating their waters, and carrying on trade and commerce. The conditions prevailing along the boundary at the time of the making of that treaty were such that no other purpose could have been sought. The explanatory article adopted May 4, 1796 (8 Stat. 130) confirms this. It stated:

> That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood

> to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

Nothing in Article III justifies the contention that the contracting parties intended to stipulate that subjects of the British Government could settle in the United States and engage in labor for hire or that anything more was intended than to provide for free commercial intercourse and passage through the waterways and over the portages for purposes of travel, trade, and commerce.

In a letter dated November 19, 1794, to Secretary of State Randolph, Mr. Jay said:

> The third article will, I presume, appear to you in a favorable light; a number of reasons which, in my judgment, are solid, support it. I think they will, on consideration, become obvious. It was proposed and urged that the commercial intercourse

> opened by this article ought to be exempted from all duties whatever on either side. The inconveniences which we should experience from such a measure were stated and examined; it was finally agreed to subject it to native duties. In this compromise, which I consider as being exactly right, that difficulty terminated; but for this compromise the whole article would have failed, and every expectation of an amicable settlement been frustrated. A continuance of trade with the Indians was a decided ultimatum; much time and paper, and many conferences were employed in producing this article; that part of it which respects the ports and places on the eastern side of the Mississippi, if considered in connexion with the —— article in the treaty of peace, and with the article in this treaty which directs a survey of that river to be made, will, I think, appear unexceptionable. (American State Papers, Foreign Relations, Vol. I, p. 503.)

To construe the word "business" in Section 3 of the Immigration Act to exclude labor for hire does not run counter to the fair construction of Article III of the Jay Treaty, except that under the Immigration Act business visits must be temporary, while visits to the United States for trade and commerce under the Jay Treaty were unlimited in duration. This in itself shows that the Immigration Act ignored the Jay Treaty. We believe, therefore, that the construction of the Immigration Act contended for by the petitioners should

not be rejected because it is thought to be in conflict with any stipulation in the Jay Treaty.

III

AN ALIEN WHO VISITS THE UNITED STATES TO LABOR FOR HIRE IS NOT A VISITOR FOR BUSINESS

The Circuit Court of Appeals and the respondents devote time to the contention that the respondents are not fairly within the definition of "immigrant" in the first part of Section 3. Their contention is that the word "immigrant" is ordinarily understood to mean one who comes here for permanent residence, and not for temporary purposes, and that one who retains a domicile or residence abroad and comes to the United States temporarily to work is not an immigrant.

The authorities cited to support this contention antedate the passage of the Immigration Act of 1924. No doubt in times past the word "immigrant," as used in our law, has ordinarily been used to describe those coming here for permanent or indefinite residence. The Immigration Act of 1924, however, makes its own definition of the word "immigrant." It is all inclusive and free from ambiguity. Section 3 says:

> When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States.

This sentence is not qualified by the words "for permanent residence." The exceptions in Section

3 prove the rule. If the definition of the term "immigrant" in the first clause was not broad enough to include aliens coming here for temporary stays, why was it necessary to except aliens in continuous transit through the United States, officials of other governments, seamen stopping over at our ports between voyages, or aliens visiting the United States temporarily as tourists, or temporarily for business or pleasure? To argue that the respondents are not within the initial definition of the word "immigrant," even if they are not protected by the exception, leads to the conclusion that there is a class of aliens not dealt with by the statute. It is too clear for argument that, to escape inclusion in the definition of "immigrant," the respondents must come within one of the exceptions. They can not escape on the theory that the term "immigrant" was not used to include persons making temporary visits. In Section 7 (b) of the Act of 1924, providing for the contents of applications for immigration visas, it is provided that every immigrant applying for an immigration visa shall state in his application—

> the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently.

This is hardly consistent with the notion that no one is an immigrant under the Act unless he intends to remain permanently.

The real question in this case is whether Congress intended the word "business" to include labor for hire. It does not help to a conclusion to quote lexicographers to the effect that the word "business" may sometimes be used to include labor for hire. The question here is in what sense it was used in this Act. That is to be determined, among other things, by the objects and purposes of the statute. In common parlance the word "business" does not include labor for hire, nor do we think of a laborer as being a business man, nor would it seem reasonable for a common laborer from southeastern Europe coming here to work in the mines, or on a construction job, to call himself a business man, or say that he is coming to the United States on a business visit.

The origin of the provisions of Section 3 of the Immigration Act may be found in Section 3 of the Immigration Act of February 5, 1917. (c. 29, 39 Stat. 874, 875.) That Act, after providing for the exclusion of persons mentally, morally, or physically defective, or whose beliefs on governmental matters disqualified them for admission, provided for the complete exclusion of natives of what is known as the barred zone, and then, with respect to persons coming from the barred zone, stated that the provisions should not apply to

> Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students,

> authors, artists, merchants, and travelers for curiosity or pleasure.

Here we have governmental officers, and merchants and travelers for curiosity or pleasure dealt with. There is nothing in that provision to justify the exception of those coming to labor for hire.

The quota Act of May 19, 1921 (c. 8, 42 Stat. 5), in Section 2(a), provided—

> That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to three per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) aliens visiting the United States as tourists or temporarily for business or pleasure.

Here, instead of using the words "merchants, and travelers for curiosity or pleasure," the phrase is

aliens visiting us "as tourists or temporarily for business or pleasure." No doubt the word "business" was substituted for merchants, since there are various kinds of commercial intercourse and business not strictly merchandising, but there is nothing to suggest that the phrase was broadened for the purpose of including laborers or workmen. The phrase used in the Immigration Act of 1921 was again used in the Act of 1924. Prior to the quota Acts there was no reason to distinguish between working people and business men. With certain exceptions, because of ineligibility for admission to citizenship or treaty obligations, all persons physically, mentally, and morally qualified for admission were allowed to enter, whether for temporary or permanent stays. The quota Act changed this. One purpose was to restrict the number of immigrants because of the difficulty of assimilation.

An important purpose of the quota Act was, however, to protect American labor against an influx of cheap foreign labor and to prevent an aggravation of the conditions in respect of nonemployment. This is made clear by the reports of the Committees of the House and Senate relating to the Quota Act of May 19, 1921, and to the quota provisions in the Immigration Act of 1924. In speaking of the exemptions in Section 2 (a) of the 1921 Act of persons visiting the United States temporarily for business, the House Report says (p. 2): "Liberal

exemptions are made, including travelers for business or pleasure." This does not seem to contemplate persons coming here to labor. The report gives as a reason for restriction (p. 3): "Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration."

Attention is called in the Report to the fact that arriving immigrants go to the coastal cities and congested industrial districts. (House Report No. 4, p. 6, 67th Cong., 1st Session.)

The Senate Report on the Act of 1921 (Senate Report No. 17, 67th Cong., 1st Session) says (p 4):

> This new immigration coming almost wholly from eastern and southern Europe differed in character from the old immigration in that substantially 70 per cent of it, as a whole, consisted of males and substantially 86 per cent of the males were living single lives, being unmarried or having left their wives in Europe. They came to the United States not so much for the purpose of remaining here and making homes as to seek profitable employment at the seats of our great basic industries.

In showing that this type of immigrant is migratory and his sojourn temporary, it was said (p. 5):

> In connection with alien departures, it should be noted that the number of departures of the new group of aliens comprising

> southern and eastern Europe far exceeds that of the old group comprising northern and western Europe. For example, in the year ending June 30, 1920, there were 226,560 departures of the new group as compared with 41,532 of the old group; in other words, there were 122 departures of the new group to every 100 admitted, while of the old group there were only 25 departures to every 100 admitted. In the month of July 1920, of the new group there were 22,534 departures and there were 34,228 admitted, while of the old group there were only 3,451 departures and 19,869 were admitted. These figures forcibly illustrate the temporary character of the emigration from southern and eastern Europe.

Other parts of the report disclose the purpose to protect American labor. Like considerations are advanced with respect to the revised quota provisions in the 1924 Act. (House Report No. 350, 68th Cong., 1st Session.)

The first Quota Act of 1921 excepted from its operation aliens who resided continuously for one year in Canada and Mexico. Because of the rush of aliens to these countries to qualify by short residence, the exception was modified in 1922 to require five years residence in the contiguous countries to avoid the quota restrictions, and finally, in the Act of 1924, that method of being relieved from the quota was stricken out entirely.

While this case deals only with daily crossing of the border, it is obvious that the effect of the ruling of the court below is more far-reaching. The regulations have always provided that temporary presence for business purposes may extend for six months or even a year. If labor is business, temporary presence to labor for hire may be that long. Large numbers of alien laborers are migratory. It is common knowledge that with modern, quick, and cheap transportation they come from abroad, work here for a time, and return. The construction of the statute adopted by the Circuit Court of Appeals opens the doors wide to the admission of migratory alien labor, domiciled across the boundary line or even abroad, and admitted to engage in labor for months at a time over any part of the United States. In *U. S. ex rel Graber* v. *Karnuth*, not yet reported, but printed in Appendix B hereto, at page 62, the court below seems to proceed on the theory that the words used in the immigration laws mean one thing in the case of subjects of Great Britain, because of the Jay Treaty, and another thing when applied to other aliens.

Our petition for certiorari and supporting brief stated, in substance, that not until 1927, when General Order No. 86 was issued, did the Department of Labor construe the Immigration Act of 1924 as here contended for. In this we were mistaken. The original petition for certiorari and supporting

brief were inadequate in several respects. The records of the Department of Labor and the Department of State show that as early as October 13, 1924, the Department of Labor with the Canadian boundary in mind, held that persons coming to the United States to labor for hire or to search for employment were not coming for business or pleasure within the meaning of the Act. (See Appendix C, p. 68.)

The regulation adopted pursuant to Section 24 of the Immigration Act of 1924 by joint action of the Secretary of State and the Secretary of Labor, issued September 30, 1925 (set forth hereinabove, page 6), is that—

> temporary visits * * * for the purpose of performing labor for hire are not considered to be within the purview of section (2) of the act.

That General Order No. 86, relating particularly to the Canadian boundary, was not promulgated until April 1, 1927, was not because of any shifting of position by the Department of Labor, but because careful consideration was being given to the proper method of dealing with the problem, and as natives of Canada are not within the quota at all, the situation was not urgent. It was not until some ingenious individual, seeking a hole in the quota restrictions, stimulated the thought that aliens residing across the boundary could enter to labor or to search for employment in the United

States on the theory that they were coming here for business, that the matter became urgent. Now, as the result of the decision below, aliens land at our Atlantic ports, claiming to enter temporarily for business, whose purpose is to search for employment or to engage in labor for hire, and when excluded by the immigration authorities are being discharged on writs of habeas corpus on the authority of the decision below.

It may also be suggested, even if the word "business" be construed to include labor, that one residing in Canada whose permanent occupation is to engage in labor in the United States, who intends to continue in it indefinitely, is not made a temporary visitor within the meaning of the statute by the fact that he crosses the boundary daily. That construction of the Act would not cover the case of seasonal labor and we take the broader view that laboring for hire, or seeking employment, is not business.

Although the word "business" has often been construed to include labor, the purpose of the Immigration Act, the connection in which the word is used in the statute and the context make it a reasonable view that Congress did not intend that aliens coming here to labor for hire or to search for such employment should be treated as visiting the United States temporarily for business or pleasure.

It is respectfully submitted that the judgment below should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.
FRANK M. PARRISH,
Attorney.

GREEN H. HACKWORTH,
Solicitor, Department of State.
RICHARD W. FLOURNOY, JR.,
Assistant to Solicitor,
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THEODORE G. RISLEY,
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B. W. BUTLER,
ALBERT E. REITZEL,
Assistants to Solicitor,
Department of Labor.

FEBRUARY, 1929.

APPENDIX A

BUREAU OF IMMIGRATION,
Washington, April 1, 1927.

No. 55479/537
55266/General.

GENERAL ORDER NO. 86

SUBJECT: LAND BORDER CROSSING PROCEDURE

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occured prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

C. Natives of quota countries whose original admission occurred subsequent to June 2, 1921, and prior to May 11, 1922, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of one year.

D. Natives of quota countries whose original admission occurred subsequent to May 10, 1922, and prior to July 1, 1924, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of five years.

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from June 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

Dated this —— day of ————, 192—, at ————.

----------,
Immigrant Inspector.

8. Identification cards held by or issued to aliens of the "nonimmigrant" class shall be rubber-stamped as follows:

NONIMMIGRANT

Dated this —— day of ————, 192—, at ————.

----------,
Immigrant Inspector.

9. To insure uniformity stamps furnished by the bureau only shall be used, and blank spaces, including that for signature, shall be filled in by the use of indelible pencil.

10. All identification cards heretofore issued, held by aliens who can not, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

11. The work of validating outstanding cards should proceed slowly, systematically, steadily and persistently, and in such a manner as to avoid con-

fusion, congestion, interference with proper routine administration and the giving of just grounds for complaint upon the part of the traveling public.

12. The status of holders of identification cards shall be inquired into periodically, preferably every six months from date stamped, where practicable, but in any event not less frequently than once a year. When inquiry has been so made, it will be evidenced by a notation to show date of such inquiry and initials of the officer upon the reverse of the card. When the holder of a "nonimmigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

GEORGE J. HARRIS,
Acting Commissioner General.

Approved:
ROBE CARL WHITE,
Assistant Secretary.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

* * * * *

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, on the Relation of John Graber, relator

against

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Robert P. Clark, Inspector in Charge, United States Immigration Service, respondents.

* * * * *

Before

MANTON, SWAN, and AUGUSTUS N. HAND, *Circuit Judges.*

Appeals from the District Court for the Western District of New York. The relator sued out a writ of habeas corpus; writ dismissed; relator appeals. Complainant also sued the Director of Immigration, seeking to restrain him [from] interfering with his free passage to and from his home in Canada to the United States for the purpose of

engaging in or seeking employment. Complaint dismissed; complainant appeals.

Affirmed.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Realtor-Appellant.
RICHARD H. TEMPLETON,
United States Attorney
for Western District of New York.
RICHARD A. GRIMM,
Assistant United States Attorney, Counsel.

MANTON, *C. J.*:

These appeals will be considered in one opinion.

John Graber, a native of Roumania, alleging that he resides at Niagara Falls, Ontario, Canada, presented himself before the Special Board of Inquiry at Niagara Falls, New York, on December 7, 1927, claiming the right to pass to and from Canada while he was seeking employment in the United States without having obtained an immigration visa. He claimed that he was not an immigrant, but a subject of Canada, and did not intend to reside in the United States but was only desirous of finding work here. He was again rejected by the same Board on April 5th, 1928, because he was not in possession of a consular immigration visa and because he was a person liable to become a public charge.

Both proceedings raised the question of his right to come and go, and the validity of General Order 86 promulgated by the Department of Labor June 1, 1927. He presented his passport, claiming that he was a nonimmigrant entitled to enter the United States for the purpose of seeking employment and requested the American Consul at

Niagara Falls, Ontario, for his visa. This was refused. We held in *United States ex rel. Cook* v. *Karnuth*, 24 Fed. (2d) 649, that the Jay Treaty of 1794 (8 Stat. 116), providing for a free temporary passage across the Canadian border, was in force and effect and that the Courts in construing the Immigration Act should conform to the provisions of that Treaty, and by its provisions British subjects residing in Canada, one of whom was seeking employment in the United States, were not immigrants within the meaning of the Immigration Act of 1924 (Sec. 3, U. S. C. A. Sec. 202) and that they were entitled to admission as temporary visitors for business purposes in accordance with the provisions of that Treaty. We said that business as therein used was not limited to trading and merchandising but embraced everything by which a man can be employed. The American Consul refused to visa the passport of this appellant because of Paragraph 48 of the General Instructions, Consular, 1925, which provides:

> Temporary visits, except under Rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of Sec. 3(2) of the Act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under the Section.

This regulation is in substance a reiteration of General Order 86. *The appellant, as a temporary visitor, was required to present to the Immigration*

authorities the visa pursuant to the Proclamation of the President, the last of which was issued on February 21, 1928, and as to nonimmigrants provides:

> With the exceptions hereinafter specified, they must present passports or official documents in the nature of passports issued by the Government of the countries to which they owe allegiance, duly visaed by consular officers of the United States.

The President's authority to make passport regulations is found in the Act of May 22, 1918 (40 Stat. 559) and is now in force by authority of the Act of March 2, 1921 (41 Stat. 1205, 1217). Such regulations must be consistent with the provisions of the Immigration Law. *Johnson* v. *Keating*, 17 Fed. (2) 50. The failure of appellant, as a nonimmigrant, to have his passport visaed by the American Consul is sufficient upon which to base a denial of his admission. *United States ex rel. London* v. *Phillips*, 22 Fed. (2d) 288. But he claims to be a subject of Canada because of his residence there and therefore to be entitled to benefits of the Jay Treaty. The question is therefore presented whether he was in fact a British subject within the meaning of the Jay Treaty. The Supreme Court considered the meaning of the word "subject" as used in the Immigration Law in *Nagle* v. *Loi Hoa*, 275 U. S. 475, a case arising under the Chinese Exclusion Act, providing that Chinese entering the United States shall "be identified by the Chinese Government or such other foreign government of which at the time such Chinese person shall be the

subject." It was held that the word "subject" was used in its narrow sense and indicated only those who by birth or naturalization owed permanent allegiance to the Government issuing the certificate.

In Pizzaro, 2 Wheat. 227, the Court gave a broader meaning of the term "subject" and held it included "A person domiciled in the country and enjoying the protection of its sovereign is deemed a subject of that country. He owes allegiance to that country while he resided in it, temporarily indeed if he has not by birth or naturalization contracted a permanent allegiance, but so fixed that as to other nations he follows the character of that country in war as well as in peace." But what was said in the Nagle case we think applies here, involving the question of immigration, where the word "subject" must be used in the narrower meaning. In *United States* v. *Carlisle*, 16 Wall. 147, it was pointed out that the citizen or subject owes absolute and permanent allegiance to his government and his sovereign or at least until by some open and distinct act he renounces it and becomes a citizen or subject of another government or sovereign. To be sure, while domiciled within a country he owes a local and temporary allegiance which continues during the period of his residence. But a British subject, within the meaning of this Treaty, means any person who owes permanent allegiance to the Crown and this is to be distinguished from the allegiance of an alien who, because he is within the British Dominion, owes temporary allegiance to the Crown. (Dicey on Conflict of Laws, 3rd Edition, P. 167.) This distinction finds support in the Law of Nations and is applicable to the Treaty between the British

Empire and the United States which we are here considering. It follows that the Court below properly dismissed the writ of habeas corpus and the complaint in the equity suit.

Order and decree affirmed.

No. 55197/874

APPENDIX C

DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY,
Washington, October 13, 1924.

The Honorable The SECRETARY OF STATE.

MY DEAR MR. SECRETARY: I beg to acknowledge receipt of your letter of September 16 (A–4 102.9102/21) relative to the immigration situation on the Canadian border, particularly as it concerns the admission of seasonal labor from Canada for employment in Maine and New Hampshire.

This Department had already considered the possibility of waiving the immigration visa required in connection with Section 4 (c) of the Immigration Act of 1924 so far as temporary labor coming over the Canadian and Mexican borders is concerned, but, as you suggest, it would appear that this could be done only in the event that such laborers could be classed as aliens visiting the United States temporarily as tourists or temporarily for business or pleasure under Section 3 (2) of the Act. In other words, that such aliens could be regarded as nonimmigrants within the meaning of the new law.

Several inquiries and appeals were received from employers of seasonal labor from states on the Mexican and Canadian borders, but after most careful and sympathetic consideration the conclusion was reached that this was not a practical solu-

tion of the problem. This view was chiefly based on the fact that under the provisions of the contract labor law aliens coming to the United States as seasonal laborers could be admitted only when it was shown that they were not coming as the result of any contract or other inducement to perform labor in the United States. In other words, they could be admitted only if coming in search of employment, and this Department does not believe that laborers coming for that purpose could be considered as non-immigrants under Section 3 (2) of the Act. This would not apply in the case of skilled laborers who were being imported by employers under exception to the contract labor law as provided, but the ordinary agricultural laborers, such as customarily come from Mexico and Canada, are clearly not skilled laborers within the meaning of the general immigration law.

If this view of the situation prevails, and there seems to be no escape from it without a material modification of the law, the usual movement of seasonal laborers from Canada and Mexico could be expedited only by providing such consular facilities as would make it possible for them to secure the necessary immigration visas without going long distances from their homes. It is understood that such facilities are available along the Mexican border, but that this is not true of that part of the Province of Quebec adjacent to Maine and New Hampshire, which is the source of a very considerable annual immigration of temporary laborers and also of immigrants who come to the United States for a more permanent residence. In view of this, this Department is of the opinion that the situation can be solved or even favorably modified only

through the appointment of immigration officers or others as Vice Consuls for immigration purposes at or near the principal ports of entry for immigrants in the region last referred to. In view of the favorable reference to this proposal in your letter of September 16, this Department has communicated with the officer in charge of the Immigration Service in the district under discussion, and he now proposes, if the suggested plan is followed, that the following officers of the Immigration Service be designated as Vice Consuls solely for the purpose under discussion:

Edward A. Hart and Ernest S. Weldon, Jackman, Maine; Arthur A. Bourget, Chartierville, Quebec; Roy F. Kent, Fort Kent, Maine; Joseph A. Masse, Van Buren, Maine; John B. Johnson, Fort Fairfield, Maine; and Fred W. Arndt, Houlton, Maine. Houlton is the nearest to an American Consulate and can best be eliminated if elimination is necessary.

Your suggestion that an officer of the Department of State will confer with an officer of the Department of Labor upon this subject at any time is noted, and if you will designate some one in this connection, a representative of this Department will confer with him at any time.

I am, Sir, with great respect,

Very sincerely yours,

ROBE CARL WHITE,
Second Assistant Secretary.

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